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No. 97-1418

In the Supreme Court of the United States

OCTOBER TERM, 1998

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Successor by merger to Bank of America Illinois,
PETITIONER

v.

203 NORTH LASALLE STREET PARTNERSHIP,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Rule 25(5) of the Rules of this Court, petitioner hereby files this supplemental brief for the sole purpose of responding to the supplemental brief of respondent filed on October 14, 1998.

1. Five courts of appeals have decided the exact question presented in this case. Two of those courts of appeals have agreed with respondent's position, and this Court has granted certiorari to review each of those two decisions.[1] The other three courts have agreed with petitioner's position, though a 2-1 majority of the Fifth Circuit subsequently vacated that court's discussion of the issue without explanation.[2] To the extent that this Court looks to decisions of the courts of appeals for persuasive guidance, those five decisions more than sufficiently debate the merits of the precise question this Court granted certiorari to decide.

Respondent contends, however, that this Court should take guidance from a post-*Greystone* Fifth Circuit decision that does *not* present the same issue as this case. *In re Cajun Electric Power Cooperative, Inc.*, 150 F.3d 503 (1998).[3] Neither the debtor nor any other party in *Cajun* proposed to receive or retain an interest in a bankruptcy estate in exchange for a con-

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[1] *In re 203 North LaSalle Street Partnership*, 126 F.3d 955 (7th Cir. 1998) (decision below); *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993), cert. dismissed, 513 U.S. 18 (1994).

[2] *In re Coltex Loop Central Three Partners, L.P.*, 138 F.3d 39 (2d Cir. 1998); *In re Bryson Properties*, 961 F.2d 496 (4th Cir. 1992); *In re Greystone III Joint Venture*, 995 F.2d 1274, 1282-1284 (5th Cir. 1991), vacated, 995 F.2d 1284.

[3] If the Court is disposed to look at recent court of appeals decisions that do not present the same issue that is before the Court, more pertinent than *Cajun* is *In re Southeast Banking Corp.*, No. 97-4436, 1998 WL 663359, at *8 & n.16 (11th Cir. Sept. 28, 1998), where the court held that clear statutory language sufficed to demonstrate Congress's intent to depart from pre-Code practice, despite the absence of any legislative history acknowledging the departure.

tribution of "new value" to the estate. Rather, one plan proponent (SWEPCO) made certain direct payments to certain creditors and/or equity holders (members of the Committee of Certain Members, or "CCM") to reimburse them for certain litigation fees and expenses and allegedly to try to help secure their support for a plan of reorganization proposed by SWEPCO. "SWEPCO's payments to the CCM * * * were not made out of the bankruptcy estate's assets." 150 F.3d at 518.

The Fifth Circuit rejected an argument that the payments from SWEPCO to members of the CCM violated either 11 U.S.C. § 1123(a)(4) or 11 U.S.C. § 1129(b)(2)(B)(ii). In the passage that respondent selectively quotes, the court explained its rationale as follows:

> [T]he payments were not made in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case.

150 F.3d at 518-519. *Cajun* thus stands for the entirely unremarkable proposition that, when a creditor receives money from another participant in the bankruptcy case[4] in exchange for something other than its bankruptcy claim, it is not receiving or retaining property "on account of" its interest in the estate.

Cajun does *not* stand for the proposition that "on account of" means "in satisfaction of." The phrase "in satisfaction of" was merely used to explain the court's rationale, not to define "on account of" for all purposes. Any synonym for "on account of" would have worked equally well to explain the court's reasoning.

[4] We use the ambiguous phrase "another participant in the bankruptcy case" advisedly. The Fifth Circuit's opinion never definitively characterizes SWEPCO as a creditor, a pre-petition equity holder, an interested third party, or anything else. Likewise, the court found it unnecessary to classify the recipients of the payments as creditors or equity holders. 150 F.3d at 515 n.6 ("our decision hinges in no way upon the characterization of the members' various interests as debt or equity-based"). The fact that those questions of classification — which are vitally important in a new-value case — were completely irrelevant to the Fifth Circuit's decision shows how far afield the issue in that case was from the issue in this case.

What *Cajun* does demonstrate, however, is that the phrase "on account of" has many roles to play in separating forbidden reorganization plans such as respondent's from those plans that do not violate the statute. As we observed in our opening brief (at 22 n.12) and reply brief (at 9), one need not invent a new value exception, which can be found nowhere in the Code, to prevent the words "on account of" from being superfluous. Thus, *Cajun* conclusively proves the fallacy of part of the reasoning of one of the two appellate decisions supporting respondent, *Bonner Mall*, 2 F.3d at 909.

2. The Court is welcome to read the forthcoming law review article respondent cites in its supplemental brief, or any of the scores of other law review articles on both sides of the new value debate. We respectfully submit that the more persuasive scholarship is found in the articles and decisions that support petitioner's position in this case, and in the amicus brief filed by nine eminent bankruptcy professors in support of petitioner in this case.[5] Indeed, as our reply brief points out (at 4-5), even the law professors who have filed briefs in support of *respondent* have previously taken the position in academic writings that a plan of reorganization may not lawfully afford pre-petition equity holders — as the plan in this case does — the *exclusive* right to receive new equity interests by contributing "new value." See also Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 114-115 (1991). When all is said and done, there is *no* discernible academic support for a *debtor-only* new value exception, which is what this case involves.

As to the new article, it is written not by a law professor, but by a lawyer in private practice.[6] The article's analysis is

[5] Brief of Ronald Mann, Robert K. Rasmussen, Barry Adler, James Bowers, Daniel L. Keating, Eric A. Posner, Alan Schwartz, David A. Skeel, Jr., and James J. White, as *Amici Curiae* in Support of Petitioner.

[6] Randolph J. Haines, *The Unwarranted Attack on New Value*, 72 AM.

very similar to that of Professor Markell. In particular, it advances the contention that Section 1129(b)(2) provides merely "nonexclusive examples of methods for satisfying the fair and equitable requirement." 72 AM. BANKR. L.J. at 302 n.3.[7] As was shown in our reply brief (at 5 n.7) and opening brief (at 18 n.10), that argument is completely untenable. Section 1129(b)(2) declares that "the condition that a plan be fair and equitable with respect to a class *includes the following requirements*." 11 U.S.C. § 1129(b)(2) (emphasis added). "Requirements" are not mere examples.

Mr. Haines also seems to fail to appreciate that negotiation, not cramdown, is how Congress intended parties to allocate any value that may be available in a reorganization but not in a liquidation. See Pet. Br. 29-30; Reply Br. 19. Mr. Haines writes:

> [*203 North LaSalle*] does not raise the concern that new value proposals are inherently illogical economically. Given the tax consequences to the limited partners, the apartment [*sic*] project inherently had a value $20 million greater to them than to anyone else. Assuming the $55.8 million fair market value as found by the court, it would have something closer to a $75 million value to the partners. Under those circumstances, it makes perfect economic sense for the owners and the bank to split the valuation difference, by the owners contributing new value that provides the creditor a greater value than it would receive upon foreclosure, but that still justifies the partners' investment of new money.

BANKR. L.J. 301 (1998). Mr. Haines is a member of Lewis and Roca, Phoenix, Arizona. *Id.* at 301 n.*. For persuasive articles by lawyers in private practice taking contrary positions, see, *e.g.*, Brian A. Basil, *The New Value Exception to Absolute Priority in Bankruptcy*, 101 COM. L.J. 290 (1996), and Michael H. Strub, Jr., *Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single-Asset Paradigm of* Bonner Mall, 111 BANKING L.J. 228 (1994).

[7] See also 72 AM. BANKR. L.J. at 332 & n.167; Markell Br. 2, 21; Resp. Supp. Br. 3 & n.4.

72 AM. BANKR. L.J. at 309 (footnotes omitted). Mr. Haines seems to suggest that the opportunity to make the debtor and creditors alike better off through a plan of reorganization justifies judicial intrusion, but Congress had a different view. See H.R. Rep. No. 95-595, at 224 (1977) ("It is unrealistic to assume that the bill could or even should attempt to answer that question. Instead, negotiation among the parties after full disclosure will govern how the value of the reorganizing company will be distributed among creditors and stockholders.").

Furthermore, Mr. Haines seems to believe that the bank should have no quarrel with any plan that leaves the bank better off than a liquidation.[8] But, as we pointed out in the reply brief (at 9-10), such an approach makes the absolute priority rule redundant with the "best interests" test of 11 U.S.C. § 1129(a)(7), which requires any plan to provide all creditors with at least as much as they will receive in a liquidation. And Mr. Haines's approach invites the Court to substitute its judgment for that of the creditors about what is in their best interests. But this Court has already rejected that approach. *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 207 (1988) (whether creditors would be "better off if [the] reorganization plan was confirmed" is a "determination * * * for the creditors to make" and for the judiciary to "effectuate").

3. We stand by the discussion of the legislative history, including the House Report on the 1977 bill, in our opening and

[8] Mr. Haines asserts that the bank has no significant quarrel with the bankruptcy court's valuation of the property and that, thus, the bank had no legitimate basis for opposing the plan. 72 AM. BANKR. L.J. at 305 n.29, 353 n.249, 359-360. (Indeed, he makes the wholly unsubstantiated — and false — claim that the bank sought to foreclose at a value below what the plan promised it. *Id.* at 359.) This overlooks not only the bank's position relating to valuation repeatedly set out in its briefs (see Pet. Br. 5 n.2, 41-42, 42 n.24; Reply Br. 17, 20), but also the other features of the plan that would make it unacceptable to any creditor such as the plan's assumption that the bank will "voluntarily" re-lend $4.5-$5 million by year eight of the plan. See Pet. Br. 7 n.5; Pet. App. 153a; Reply Br. 20.

reply briefs.[9] Contrary to respondent's claim, the 1978 legislation did not differ in a material way from the 1977 bill on which the House Report comments.

As is reflected in the appendix to respondent's supplemental brief, Section 1129(b)(2)(B), as it would have been enacted by the 1977 bill, would have provided that a plan could not be crammed down on impaired, dissenting, unsecured creditors unless, among other things,

> (iii) each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim, unless such holder has agreed to a different treatment of such claim; or
>
> (iv) the plan does not discriminate unfairly against such class, and the holders of claims or interests o[r] any class of claims or interests, as the case may be, that is junior to such class *will not receive or retain under the plan on account of such junior claims or interests any property* * * *. [Emphasis added.]

In the statute that was enacted, Congress included *the exact same requirement*. Although Congress chose to include the relevant language as part of the definition of "fair and equitable," it made no substantive change. Section 1129(b)(1) as enacted requires that *every* crammed-down plan be "fair and equitable," and Section 1129(b)(2) defines "fair and equitable." According to Section 1129(b)(2),

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class *includes the following requirements*:
>
> * * * * *
>
> (B) With respect to a class of unsecured claims —

[9] H.R. Rep. No. 95-595 (1977). The report was quoted in *Ahlers*, 485 U.S. at 208, and in more than half-a-dozen places in our opening brief. Reliance on the report hardly started with our reply brief.

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class *will not receive or retain under the plan on account of such junior claim or interest any property*.

11 U.S.C. § 1129(b)(2) (emphasis added).

As is readily apparent, the statute as enacted contains, insofar as relevant, the *exact same substantive requirement in almost the exact same words* as the 1977 bill. To try to escape the force of the 1977 House Report by pointing to the minor reorganization of the statute's terms, therefore, is entirely disingenuous.

Respondent insists (at 4) that "fair and equitable" is a "term of art" and that Congress "inten[ded] to carry forward into the Code through the 'fair and equitable' requirement the new value principles which this Court long ago recognized." If so, then, as we observed in our reply brief (at 1 n.1), we are at a loss to understand why Congress saw fit to define "fair and equitable" in the statute, and to do so without any mention of a new value exception. And Congress *did* define "fair and equitable," as the language just quoted from Section 1129(b)(2) makes clear.[10] Respondent's claim that "Congress did not adopt 'a detailed definition of fair and equitable'" (Resp. Supp. Br. 4) is pure wishful thinking.

For the foregoing reasons and those stated in our opening and reply briefs, the judgment of the court of appeals should be reversed.

[10] The use of the phrase "includes the following requirements" shows that the definition is not *comprehensive*. But it is hard to see how anyone could seriously deny that the statutory definition of "fair and equitable," set forth in eight subparagraphs, is detailed, or that it is a definition.

Respectfully submitted.

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